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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 629

FRANCESCO MASTRAPASQUA, PETITIONER

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the Court of Appeals affirming in open court the District Court's order noting compliance with its mandate (R. 47) is reported at 186 F. 2d 717. The prior opinion of the Court of Appeals remanding the cause with directions to release petitioner from custody unless the Immigration and Naturalization Service exercised its administrative discretion with respect to his appli-

cation for relief (R. 12-31) is reported at 180 F. 2d 999. The order of the District Court noting compliance with its mandate (R. 38-39) and the prior opinion of the District Court dismissing the writ of habeas corpus (R. 7) are not reported.

JURISDICTION

The judgment of the Court of Appeals (R. 48) was entered on February 15, 1951. The petition for a writ of certiorari was filed on March 22, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Attorney General, through the Immigration and Naturalization Service, in acting upon petitioner's application for suspension of his deportation, exercised his administrative discretion, in compliance with the mandate of the court below.

STATUTE AND REGULATIONS INVOLVED

Section 19, Immigration Act of 1917, 39 Stat. 889, as amended, 54 Stat. 672 (June 28, 1940), 56 Stat. 1044 (December 8, 1942) and 62 Stat. 1206 (July 1, 1948), 8 U.S.C., Supp. III, 155(c) provides in pertinent part as follows:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of

his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act.[1] If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. These reports shall be submitted on the 1st and 15th day of each calendar month in which Congress is in session. If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. If prior to the close of the session of the Congress next following the ses-

[1] This clause enlarging the class of aliens eligible for this relief, and the succeeding provisions changing the procedure for congressional confirmation of the action of the Attorney General granting such relief has been effected by an amendment of this statute on July 1, 1948.

> sion at which a case is reported, the Congress does not pass such a concurrent resolution, the Attorney General shall thereupon deport such alien in the manner provided by law. * * *

Section 10(a), (e), Administrative Procedure Act of 1946, 60 Stat. 243, 5 U.S.C. 1009 (a), (e), provides as follows:

> Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—
>
> (a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> * * * * *
>
> (e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of

statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Section 90.12, 8 C.F.R. (1945 Supp.), in effect in 1946, read as follows:

§90.12 *Board of Immigration Appeals; reference of cases to the Attorney General.* In any case in which a dissent has been recorded; in any case in which the Board shall certify that a question of difficulty is involved, or in any case in which the Attorney General so directs, the Board of Immigration Appeals shall refer the case to the Attorney General for review of the Board's decision. In any case in which the Attorney General shall reverse the decision of the Board, the Attorney General will state in writing his conclusions and the reasons for his decision.

Section 90.12, 8 C.F.R. (1949 ed.) provides:

Board of Immigration Appeals; reference of cases to the Attorney General. The Board

of Immigration Appeals shall refer to the Attorney General for review of the Board's decision all cases which:

(a) The Attorney General directs the Board to refer to him.

(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.

(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees.

In any case in which the Attorney General shall review the decision of the Board, his decision shall be stated in writing and shall be transmitted to the party against whom the order is effective or to his counsel or representative, as provided in § 90.11(a).

Section 142.1, 8 C.F.R. (1949 ed.) provides:

Who may apply. An alien who is a member of any of the following classes and who intends to apply to a consular officer of the United States in Canada for an immigration visa for entry into the United States for permanent residence may, subject to the provisions of this part, apply for the privilege of a preexamination by officers of the Immigration and Naturalization Service for the purpose of determining in advance his admissibility into the United States for permanent residence when in possession of an unexpired immigration visa:

(a) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has been within the United States for a period of one year or more and who has a spouse, parent, or minor child, who is in the United States and is a citizen thereof or is a lawfully permanent resident alien;

(b) An alien—other than a citizen of Canada, Mexico, or any of the islands adjacent to the United States—who has resided in the United States for a period of five years or more; or

(c) An alien—other than a citizen of Canada—whose case is found to be an exceptionally meritorious case.

Section 142.2, 8 C.F.R. (1949 ed.) provides:

Aliens eligible. Preexamination shall not be authorized unless it appears to the officer granting such authorization that the alien is:

(a) Admissible to Canada;

(b) Of good moral character;

(c) Registered and/or fingerprinted as required by the Alien Registration Act, 1940; and

(d) Able to obtain the prompt issuance of an immigration visa in case it is determined that he is admissible to the United States for permanent residence.

* * * * *

Section 142.4, 8 C.F.R. (1949 ed.) provides:

Application; where deportation proceedings

have been instituted. Where the applicant is the subject of deportation proceedings, the application shall be filed as provided in § 150.6(g) of this chapter.

* * * * *

Section 150.6(g), 8 C.F.R. (1949 ed.) provides in pertinent part as follows:

Application for suspension of deportation, for departure in lieu of deportation, or for preexamination. At any time during the hearing the alien may apply, under the provisions of section 19(c) of the Immigration Act of 1917, as amended (39 Stat. 889, 54 Stat. 671, 56 Stat. 1044; 8 U.S.C. 155(c)):

(1) * * * for suspension of deportation; or

(2) * * * for the privilege of departing the United States at his own expense in lieu of deportation; or

(3) * * * for the privilege of departing the United States at his own expense in lieu of deportation and the privilege of preexamination under Part 142 of this chapter. The alien may apply simultaneously for more than one of these three reliefs. The alien shall be warned that any statements made by him in such applications may be considered as evidence in any proceedings to determine his right to enter, reenter, pass through, or reside in the United States, and that false answers to any of the questions in such applications may bar him from the relief which he requests. Any such applications shall then be introduced into evidence and made a part of the record.

STATEMENT

Petitioner, a native citizen of Italy, arrived at Boston, Massachusetts, on June 7, 1940, as a member of the crew of the Italian vessel S.S. Dino (R. 20, 22). Subsequent to the entry of Italy into World War II, the ship remained in port and he stayed aboard until March 30, 1941, when the Coast Guard, acting pursuant to a security program to prevent the sabotage of Italian vessels interned in our ports, removed petitioner from the ship (R. 20, 24). On March 31, 1941, a warrant for petitioner's arrest was issued, charging him with overstaying the statutory twenty-nine days' visit allowed to foreign seamen (R. 7, 21). A hearing was held, and, on May 23, 1941, the Board of Immigration Appeals ordered petitioner deported to Italy (R. 7, 22). A deportation warrant issued the same day, but the war prevented the enforcement of the order (R. 7, 12, 21). Following our entry into the war, petitioner, along with other Italian seamen, was interned at Fort Missoula, Montana, from whence he was paroled in March 1944 (R. 21, 24).

Since his parole, petitioner has assiduously endeavored to avoid deportation (R. 7, 12-13, 21-24). On a number of occasions, the immigration authorities suspended the warrant of deportation to allow petitioner to depart voluntarily,[2] but each time

[2] The trial court found that the following administrative dispositions were made in this matter: "November 15, 1945 (the war intervening) Board denied application to reopen

petitioner failed to depart. Finally, in March, 1948, after petitioner had failed to comply with an order of December 12, 1947, granting him the privilege of voluntary departure within 60 days, the order of deportation of May 23, 1941, was reinstated and petitioner was arrested. He has since been held at Ellis Island (R. 7, 13, 23).

Petitioner tried to have the execution of the deportation order deferred (R. 23). After that was denied, he moved for reconsideration of the order of December 12, 1947, and asked, in addition, for the privilege of pre-examination (R. 13, 20, 23).[3] In its opinion denying the motion, the Board stated that petitioner was not eligible for such relief since, in a previous case entitled *Matter of Lagomarsino,* decided February 8, 1946, the Attorney General had adopted a general policy requiring all aliens who were in this country because of conditions arising out of the war to be returned to their native country. The Attorney General had so ruled despite the fact that Lagomarsino was mar-

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case and request for pre-examination; but directed warrant withdrawn and required alien to leave country in sixty days; September 25, 1946 Commissioner denied application to reopen proceedings; Board of Appeals affirmed October 3, 1946; May 9, 1947 relator's time within which to leave country without order of deportation extended 30 days; September 29, 1947 Commissioner denied application for extension of time to depart and ordered deportation to Italy; and warrant issued; December 12, 1947 Board granted another 60 days to effect departure and upon failure to do so that he be deported to Italy; * * *" (R. 7).

[3] The procedure for pre-examination is described in the prior opinion of the Court of Appeals (R. 13-14, see *supra,* p. 2).

ried to an American citizen dependent on him for support.[4] The Board noted that petitioner's case was different from the *Lagomarsino* case in that petitioner's wife and four children resided in Italy. (R. 21.)

While petitioner's application was pending, Section 19 of the Immigration Act (8 U.S.C. 155(c)) was amended to provide that the Attorney General may suspend deportation of an alien who "has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act" (62 Stat. 1206, effective July 1, 1948, *supra,* p. 2). In October 1948, petitioner sought the discretionary relief of suspension of deportation under this statute. The Board denied the relief, again stating that, under the *Lagomarsino* case, petitioner could not be granted such privilege (R. 22-24).

Thereafter petitioner obtained a writ of habeas corpus from the District Court for the Southern District of New York. In his petition he alleged that the denial of his application for discretionary relief was a capricious abuse of discretion (R. 4). The District Court dismissed the writ and petitioner appealed (R. 8, 9).

The Court of Appeals, by a divided court, held that, since the Attorney General had by his ruling in the *Lagomarsino* case established a "policy" of

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[4] See R. 24-30 for the Board's opinion and Attorney General's action in the *Lagomarsino* case.

refusing to consider whether or not to give discretionary relief of pre-examination or suspension of deportation to those whose presence in the United States was due solely to conditions arising from World War II, he thereby, in effect, arbitrarily set up a class of aliens who could never be considered for such relief. The majority opinion (R. 20), however, cautioned that, "We are not to be taken as saying that the Attorney General may not be able to supply a rational explanation of his classification, but merely that, as matters now stand, we perceive none." It held that, in following that classification in petitioner's case, the Board was not exercising its discretion, but was refusing to exercise discretion because petitioner fell into the arbitrarily established class. The Court of Appeals therefore reversed and remanded the cause with directions that petitioner be "released from custody unless, within a reasonable time to be determined by the district court, the Immigration and Naturalization Service exercises discretion, one way or another, with respect to Mastrapasqua upon his application for pre-examination or suspension of deportation" (R. 19-20).

In compliance with the order of the trial court entered on the mandate (R. 35-37), the Acting Assistant Commissioner of Immigration and Naturalization fully reconsidered petitioner's application for discretionary relief. On July 10, 1950, he denied it on the merits, setting forth the reason for such action as follows (R. 39):

> In the instant case the respondent was removed from the vessel upon which he arrived for security reasons. He was interned as a dangerous enemy alien. His wife and children reside in his native country. He managed to remain in this country after the war only because of the forebearance of the Government in not proceeding with his deportation while he had a compensation claim pending and because he was later afforded an opportunity to depart voluntarily. He refused to leave when he had that opportunity and his case does not merit further exercise of administrative discretion.

On September 14, 1950, the Board of Immigration Appeals affirmed the denial of discretionary relief (R. 40; Pet. 15-17). In its opinion, which is printed as an appendix to the petition for certiorari (Pet. 15-17), the Board stated that, subsequent to the decision by the Court of Appeals for the Second Circuit on petitioner's appeal, it had set forth, in a decision entitled *Matter of Westerhausen,* the reasons underlying the general classification of the *Lagomarsino* rule and had thus met the objections raised by the Court of Appeals (Pet. 16-17). The opinion further stated:

> In addition to this reason, the alien has his wife and four children in Italy. The immigration laws favor uniting families—not separating them; and, therefore, we do not believe this case has appropriate appeal for suspension of deportation.

> We also hold that as this alien acquired seven years' residence in the United States by failure to leave the United States voluntarily after requesting such privilege and through counsel's giving assurances he would so leave (See Board order of November 15, 1945), he should not be granted suspension of deportation. It is our holding that residence acquired under such circumstances ought not to be applauded by the grant of suspension of deportation.

Thereafter, respondent moved (R. 39-41) the trial court for an order dismissing the writ of habeas corpus on the ground that he had complied with the order entered on the mandate of the court below. The trial court granted the order dismissing the writ (R. 38-39), and petitioner appealed (R. 45). The court below affirmed in open court (R. 47).

ARGUMENT

The petition seeks review of the last order of the court below, which summarily affirmed the trial court's order dismissing the writ of habeas corpus on the ground that the Board of Immigration Appeals had complied with the mandate to exercise administrative discretion, "one way or another", with respect to petitioner's application for the discretionary relief of pre-examination[5] and suspen-

[5] Petitioner seems to have abandoned his application for pre-examination. Upon review of the Commissioner's ruling, with respect to petitioner's application for suspension of deportation after a reconsideration of the case following the

sion of deportation. Thus, the sole question sought to be reviewed here is whether the Immigration and Naturalization Service did in fact, as both courts have held it did, exercise administrative discretion in its latest ruling denying petitioner's application.

Petitioner contends (Pet. 2, 8-14) that the final opinion of the Board of Immigration Appeals is still based on the *Lagomarsino* ruling, and therefore does not represent the exercise of administrative discretion required under the mandate of the Court of Appeals. That court found so little merit in the argument that it affirmed in open court the district court's order noting compliance with its mandate. We submit that such ruling was clearly correct.

The Board of Immigration Appeals undertook to explain the *Lagomarsino* classification by referring to its decision in *Matter of Westerhausen* in which it set forth the reasons for the general policy adopted in the *Lagomarsino* case and similar cases involving aliens in this country because of war conditions (Pet. 16-17). That reasoning supplies the "rational explanation" for the general policy which the Court of Appeals found lacking on petitioner's prior appeal and shows that the general

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mandate of the lower court, the Board stated (Pet. 17): "Counsel admits that preexamination is not in order as a quota number is not readily available. His argument to us was limited solely to the proposition that the alien ought to be granted suspension of deportation."

policy is itself a valid exercise of administrative discretion.

At all events, the subsequent portion of the final opinion of the Board of Immigration Appeals shows that its ruling affirming the denial of relief in this case was based, not on the general rule, but on the facts relating specifically to petitioner as an individual. The Board assigned two reasons for its action—(1) that petitioner had a wife and four children in Italy; (2) that he had acquired seven years' residence in the United States only because he failed to leave voluntarily after requesting such privilege and after counsel had given assurances he would leave (Pet. 17, see Statement, *supra,* p. 13). Manifestly, therefore, the Board did consider petitioner's individual circumstances and denied him relief as a matter of administrative discretion.[6]

It is established that the power vested in the Attorney General or his delegate, the Commis-

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[6] Petitioner's argument addressed to the alleged invalidity of the *Lagomarsino* decision because the Attorney General did not set forth in writing his reasons for reversing the Board of Immigration Appeals (Pet. 10) is thus irrelevant. The Board was not relying on the *Lagomarsino* ruling as controlling its action; it was affirming and explaining its general policy.

Petitioner also challenges the basis of the Board's action by arguing that under the 1948 amendment, American family ties are not a prerequisite to relief (Pet. 12). Manifestly, however, the existence of family ties in the native country is a factor which may properly be considered in determining whether to grant discretionary relief. Petitioner also argues (Pet. 12) that he should not be penalized for his refusal to leave where the order directing voluntary departure was granted because of the invalid *Lagomarsino* ruling. Petitioner, however, first agreed to leave voluntarily in 1945, prior to the *Lagomarsino* decision (Pet. 17, R. 40-41, 30).

sioner of Immigration and Naturalization, under Section 155 (c), to suspend a deportation order is discretionary and not subject to review by the courts, provided, of course, it is not exercised in an arbitrary or capricious manner. *United States ex rel. Kaloudis* v. *Shaughnessy,* 180 F. 2d 489 (C. A. 2); *United States ex rel. Walther* v. *District Director of Immigration and Naturalization,* 175 F. 2d 693 (C. A. 2); *United States ex rel. Weddeke* v. *Watkins,* 166 F. 2d 369 (C. A. 2), certiorari denied, 333 U. S. 876; *United States ex rel. Vassiliades* v. *Commissioner of Immigration and Naturalization,* 103 F. 2d 423 (C. A. 2); *Kavadias* v. *Cross,* 82 F. Supp. 716 (N. D. Ind.); *United States ex rel. Zabadlija* v. *Garfinkel,* 77 F. Supp. 751 (W. D. Pa.), affirmed, 173 F. 2d 222 (C. A. 3). The action here is not arbitrary or capricious. Petitioner seems to assume that because he can qualify for suspension of deportation under the 1948 amendment to Section 155 (c), the Attorney General must grant him such relief. The statute, however, states that the Attorney General may grant such relief, not that he must do so. Ordinarily, to obtain favorable action in matters of this nature more is required than mere showing of a *modicum* of statutory compliance. The statutory requirements must be surrounded by meritorious circumstances. See *United States ex rel. Adel* v. *Shaughnessy,* 183 F. 2d 371 (C. A. 2). Indeed, the legislative history relating to the amendment of the statute indicates that members of the subcommittee of the House Judiciary Committee

were endeavoring to limit the effect of the bill to a group of aliens who at that time were ineligible for suspension of deportation but whose cases were considered to be unusually meritorious. See Sub-Committee Hearings,[7] House Jud. Com., on H. R. 2933, 80th Cong., 1st sess., pp. 129-133.

In this case, the Attorney General, through the Commissioner of Immigration and the Board of Immigration Appeals, considered all the circumstances in petitioner's case, and assigned several patently reasonable grounds for finding it unmeritorious. Such action was a valid exercise of administrative discretion and there is no basis for judicial reversal.

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[7] Thus, by the amendment Congress, though actually expanding the class of deportable aliens who may apply for the privilege of suspension of deportation, in effect, tightened its control over the discretionary power of the Attorney General in these matters by requiring congressional confirmation of his action in cases in which suspension in excess of six months is granted. It felt that the Attorney General was granting discretionary relief in too many cases, which automatically received congressional affirmance under the former statute simply because of inaction on the part of Congress. This was the reason for providing for affirmative congressional action. See S. Rep. 1204, 80th Cong., 2d sess., pp. 3-4.

CONCLUSION

The judgment below is correct, and the petition for certiorari presents no question requiring further review by this Court. It is respectfully submitted that the petition should be denied.

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